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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-892

THOMAS RICHARD MANN,

Petitioner,

vs.

STEWART C. SMITH, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THOMAS RICHARD MANN,

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STEWART C. SMITH, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner Thomas Richard Mann respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 9, 1973.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, and the order of the district judge denying petitioner's application for habeas corpus and dismissing the petition, not reported, appear in the Appendix to this petition.

Jurisdiction.

The opinion of the Court of Appeals was rendered on July 9, 1973. On September 30, 1973, Mr. Justice Douglas extended the time within which to petition for certiorari until December 6, 1973. On October 18, 1973, the Court of Appeals granted petitioner leave to file a petition for rehearing *en banc*. This petition was

denied on November 15, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Question Presented.

May a prisoner in state custody seek federal habeas corpus after a guilty plea in a state court where it is asserted that the prisoner is in custody in violation of the Fourth and Fourteenth Amendments to the Constitution, and State statutory law specifically provides for review of Fourth and Fourteenth Amendment claims after a guilty plea?

Constitutional and Statutory Provisions Involved.

United States Constitution, Article I, Section 9, Clause 2:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law. . . .

United States Code, Title 28:

Section 2241. Power to Grant Writ of Habeas Corpus

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Section 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

California Penal Code:

Section 1538.5(m).

. . . A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is

predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some state of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

Statement of the Case.

On January 4, 1971, petitioner pleaded guilty to possession of a small amount of marijuana which had been found in a filing cabinet in the bedroom of his home by searching state police. This plea came after the legality of the seizure of the marijuana had been litigated to the fullest extent then possible. The State Supreme Court had heard petitioner's claims and held against him.[1] Mr. Justice Douglas denied a stay pending application for certiorari, and this Court denied certiorari. *Mann v. California,* 400 U.S. 1023 (1971).

On March 18, 1971, petitioner petitioned for federal habeas corpus, alleging that he was held in state

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[1]*Mann v. Superior Court,* 3 Cal.2d 1 (1969). Petitioner's claim that these rights under the Fourth and Fourteenth Amendments were violated is based upon the following facts (as alleged in the petition for habeas corpus at p. 2):

> Police officers heard a rumor that Petitioner smoked marijuana or allowed marijuana to be smoked at his home. They came to Petitioner's house at night and crept behind some bushes which were shielding the dining room window to Petitioner's home. They pushed some bushes out of the way, and sat in front of the window, behind the bushes, for at least 15 minutes, spying on what was going on inside through a hole between the blinds, curtains and drapes which Petitioner thought entirely covered the window. They then, because of what they saw, went around to the front door to try and gain admittance to make arrests. Right before the police knocked on the door, three invited guests were let in. The police followed those guests, knocked on the door (Petitioner denied this) and were asked to come in (Petitioner denied this). The person who told the police to come in was not the Petitioner, and not one of the residents

custody in violation of the Fourth and Fourteenth Amendments to the United States Constitution. District Judge Robert J. Kelleher, in his memorandum opinion of March 26, 1971, stated that petitioner's conviction did not raise "any issue of constitutional dimension" (App. p. 4), and dismissed the petition.

A divided Court of Appeals for the Ninth Circuit affirmed, without reaching the merits of petitioner's constitutional claims, holding that petitioner "had lost his right to raise this challenge" to the legality of his confinement (App. p. 2) because "subsequent to a plea of guilty, there can be no federal collateral attack based upon an alleged violation of constitutional rights occurring prior to the guilty plea." (App. p. 3.)

Petitioner's contention is that his right to federal habeas corpus is not barred by his state court guilty plea because state law, Penal Code Section 1538.5(m), provides for appellate review of the validity of a search or seizure after a guilty plea.

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of the house, and the police knew this. The police also knew that they were only being let in because the people inside thought they were guests. The only reason the police even asked to be let in was because of what they had seen looking through the window.

After the police got inside Petitioner's home they arrested everybody, and said that they had done so because of what they had seen through the window. They then searched the entire two-story house, and found a small amount of marijuana. Part of the marijuana they found (about enough to make three marijuana cigarettes) was in a box in a filing cabinet in Petitioner's bedroom. This is the marijuana that Petitioner admitted was his when he pled guilty.

The late Mr. Justice Peters dissented from the California Supreme Court Opinion. 3 Cal.3d at 10. District Judge Enright, sitting by designation on the court below, in his dissent, stated that he found petitioner's application to have merit, and would have granted the writ.

REASON FOR GRANTING THE WRIT.

The Decision Below Conflicts With the Decisions of the Second Circuit Court of Appeals as to the Proper Interpretation of 28 U.S.C. Sections 2241 and 2254.

Sections 2241 and 2254 limit federal habeas corpus relief to prisoners who are in custody in violation of the Constitution. This Court, in *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 364 (1968), and *Warden v. Hayden*, 387 U.S. 294 (1967), has provided federal habeas corpus relief for state prisoners in custody in violation of the Fourth and Fourteenth Amendments to the Constitution, or assumed that it is available.[2]

At issue here is the right of a state prisoner to assert Fourth Amendment violations after a guilty plea in a state court, where the state court guilty plea allows further review of the constitutional violation complained of. This question has arisen and been decided in the Second and Ninth Circuits. California and New York have provided by statute that defendants may seek review of trial court rulings on Fourth Amendment claims after a guilty plea.[3] There is a conflict between the decision below and the decisions of the Second Circuit.

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[2]*See also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

[3]The California provision, Penal Code Section 1538.5(m), is set forth above, pp. 3 and 4. The New York statute, New York Code Crim. Pro. Section 813-c (Supp. 1969), provided as follows:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as

The Second Circuit first considered the availability of the relief petitioner seeks. *United States v. Warden of Attica State Prison*, 381 F.2d 209, 212-15 (2d Cir. 1967). Subsequent decisions of that court are in accord.[4] Analysis begins with a recognition of the "legitimate and powerfully compelling reasons"[5] for the

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property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. (Emphasis added.)

Section 813-c has been recodified and is now found in New York Crim. Pro. Law Section 710.70(2) (1971):

2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

[4]*United States ex rel. Randazzo v. Follette*, 418 F.2d 1319 n. 1 (2d Cir. 1969); *United States ex rel. Combs v. LaVallee*, 417 F.2d 523 n. 1 (2d Cir. 1969); *United States ex rel. Cunningham v. Follette*, 397 F.2d 143, 144 (2d Cir. 1968); *United States ex rel. Molloy v. Follette*, 391 F.2d 231 (2d Cir.) (Friendly, J.) *cert. denied*, 391 U.S. 917 (1968).

[5]Judge Irving R. Kaufman's appraisal of the desirability of review after a guilty plea finds support in the Eighth Circuit, *United States v. Clark*, 459 F.2d 977 (1972); the Fifth Circuit, *United States v. Caraway*, 474 F.2d 25 (1973) (petition for rehearing *en banc* granted); the Court of Appeals for the District of Columbia, *United States v. Dorsey*, 449 F.2d 1104, 1108 n. 18 (1971) (Bazelon, C.J.); the American Bar Association, A.B.A. Project on Standards for Criminal Justice, Criminal Appeals, Section 1.3(a)(iii) (approved draft, 1970), and by Professor Charles Allan Wright, 1 C. Wright, Federal Practice and Procedure: Criminal, Section 175 at 382 (1969); see also *United States v. Cox*, 464 F.2d 937, 941 (6th Cir. 1972); *United States v. Sepe*, 474 F.2d 784 (5th Cir. 1973) (Petition for Rehearing granted).

state rule allowing review of search and seizure claims after a guilty plea:

> New York has thus provided a specific statutory exception to the general rule that a plea of guilty bars a defendant from raising on appeal alleged nonjurisdictional defects. And, we are quite easily able to discern legitimate and powerfully compelling reasons for establishing such an exception. In the greater number of cases, the present one being illustrative, a defendant in a criminal case recognizes that unless he succeeds in suppressing the evidence seized, the state will have little difficulty in proving the charges filed against him. A defendant may well have no desire to go to trial once his pretrial suppression motion has been denied, and thereafter may lose heart for any defense to the charges. If, however, the defendant is confronted with state law which decrees that a plea of guilty bars him from appealing the denial of his motion, then he will be presented with a fait accompli and be forced to proceed to trial just so that he can preserve his right to appeal. Section 813-c is an enlightened statute and was designed to alleviate this undesirable and archaic end which can only result in cluttering trial calendars. The guilty plea in such circumstances is merely a procedural step which permits review of the defendant's constitutional claims without the necessity of a trial that would be a waste of time, money and manpower.

United States v. Warden of Attica State Prison, supra, 381 F.2d at 214.

The Court recognized the long established rule that a guilty plea "is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against [the defendant]," *id.*, 381 F.2d at 212-13, but concludes that:

> "[A]ppellant's decision to enter a plea of guilty cannot fairly or realistically be viewed . . . as an 'intentional relinquishment or abandonment' . . . of his Fourth Amendment claims. Indeed, it would be anomalous if a defendant by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal in the state courts, simultaneously waived his right to present these same claims to a federal court in an application for habeas corpus because he was lulled into following state procedure."

Id., 381 F.2d at 214-15.

The decision[6] of the Ninth Circuit is based on *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) where it was stated that:

> We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is

[6]The Ninth Circuit appears to have previously overlooked any argument that the relief here sought is barred by the guilty plea. In *Houser v. Geary*, 465 F.2d 193 (9th Cir.) *cert. denied*, 409 U.S. 113 (1973), a federal habeas corpus petition subsequent to a plea of guilty was entertained, in reliance on Cal. Penal Code Section 1538.5(m). In the present case, the trial court, although it dismissed the petition, did consider petitioner's claim on the merits. Respondent herein raised its contention that federal habeas corpus was not available to petitioner after oral argument, subsequent to *Tollett v. Henderson*.

> in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

(App. p. 2) *Tollett*, the court notes, was decided after the conflicting Second Circuit decisions. This Court's statement in *McMann v. Richardson*, 397 U.S. 759, 766 (1970), that a guilty plea is, "*unless the applicable law otherwise provides*, a waiver of the right to contest the admissibility of any evidence the state might have offered against the defendant—" (emphasis added) has, in the opinion of the majority of the court below, "specifically left open" (App. p. 3) the question here presented.

Conclusion.

The conflict in decisions between the Second and Ninth Circuits justifies the grant of certiorari to review the judgment below. The reliance by the Ninth Circuit on *Tollett* to sustain its position in this case is not justified, for *Tollett* expressly relies on *McMann v. Richardson*. In *McMann*, this Court clearly indicated (397 U.S. at 766 and n. 11) that a guilty plea under the circumstances here presented is not a relinquishment of the right to seek federal habeas corpus. A writ of certiorari should issue.

Respectfully submitted,

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APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

THOMAS RICHARD MANN, *Petitioner-Appellant*, vs. STEWART C. SMITH, Chief Probation Officer, San Bernardino County, LOWELL E. LATHROP, District Attorney, San Bernardino County, *Respondents-Appellees*. No. 71-1932.

[July 9, 1973].

Appeal from the United States District Court for the Central District of California

Before: BARNES and WALLACE, Circuit-Judges, and ENRIGHT,* District Judge.

WALLACE, Circuit Judge:

The State of California charged Mann with possessing marijuana and maintaining a place for use of narcotics (Cal. Health & Safety Code §§ 11530, 11557). He pleaded not guilty and moved to suppress the marijuana seized at his home, charging violation of his Fourth Amendment rights.

His motion was denied after an evidentiary hearing in the state trial court. Mann then sought a writ of mandate directing the trial court to suppress the challenged evidence. This was denied by the Court of Appeal and then by the Supreme Court of California. *Mann v. Superior Court*, 3 Cal.3d 1, 472 P.2d 468, 88 Cal.Rptr. 380 (1970), *cert. denied*, 400 U.S. 1023 (1971).

Mann then pleaded guilty to the possession of marijuana count. The state's motion to dismiss the remaining court was granted. One month later, Mann peti-

*Honorable William B. Enright, United States District Judge, San Diego, California, sitting by designation.

tioned the United States District Court for a writ of habeas corpus. The denial of that petition is the subject of this appeal. We affirm.

Mann again claims a violation of his Fourth Amendment rights. But, having pleaded guilty, he has lost his right to raise this challenge. In *Tollett v. Henderson*, 41 U.S.L.W. 4486, 4488-89 (U.S. Apr. 17, 1973), the Court stated:

> We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

The voluntariness and intelligent character of Mann's plea are not here questioned. No other issue remains.

The dissent suggests the rule should be different where there is a state procedure, such as in California[1] and New York,[2] which allows a defendant to appeal

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[1]Cal. Penal Code § 1538.5(m) (West 1970). It is questionable whether Mann was availing himself of this procedure. He did not plead guilty with the expectation of appealing to the state court. Rather, he pleaded not guilty and petitioned for a writ of mandate based upon the denial of his motion to suppress. It was denied by the California appellate courts and the United States Supreme Court denied certiorari. Then, he pleaded guilty.

Apparently a plea bargain was made in which Mann entered his plea in exchange for the dismissal of one count of the two-count indictment. This would be more consistent with a relinquishment of his Fourth Amendment claims than an attempt to preserve them. *See* Tollett, *supra*, 41 U.S.L.W. at 4489.

[2]N.Y. Code Crim. Proc. § 813-c (Supp. 1969).

the denial of his motion to suppress even after a conviction predicated upon a plea of guilty. An analogous question was specifically left open in *McMann v. Richardson*, 397 U.S. 759, 770 n.13 (1970). Our brothers of the Second Circuit have made such an exception.[5] However, their decision predated *Tollett* which made no mention of any exceptions.

While states may institute various internal procedural rules for testing questions on state appeal, we believe the wise course is to have a uniform rule applicable to all states when federal habeas corpus is requested. While this question was not specifically presented, *Tollett* states a rule which appears to cover all federal habeas corpus petitioners. We hold that, subsequent to a plea of guilty, there can be no federal collateral attack based upon an alleged violation of constitutional rights occurring prior to the guilty plea.

If, in fact, Mann did rely on the erroneous advice of his attorney and believed that he could still raise his constitutional claims subsequent to the guilty plea, he should raise that question by attacking the voluntariness and intelligent character of his plea. *Tollett, supra*, 41 U.S.L.W. at 4489.

AFFIRMED.

ENRIGHT*, District Judge, dissenting:

I respectfully dissent.

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[5]United States *ex rel. Rogers v. Warden*, 381 F.2d 209 (2d Cir. 1967); United States *ex rel.* Molloy v. Follette, 391 F.2d 231 (2d Cir.), *cert. denied*, 391 U.S. 917 (1968). We have heretofore entertained a federal habeas corpus petition subsequent to a plea of guilty in a California state court. Houser v. Geary, 465 F.2d 193 (9th Cir. 1972), *cert denied*, 409 U.S. 1113 (1973). However, we did not discuss the point at issue here and the case was decided prior to the direction of the Court in *Tollett*.

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

The majority rely upon the following language in *Tollett v. Henderson*, 41 U.S.L.W. 4486, 4488-89 (U.S., Apr. 17, 1973):

> We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

I am unable to agree with the court's position on the problems posed and the specific issues reserved in *McMann v. Richardson*, 397 U.S. 759 (1970), one of the *Brady* trilogy.[1]

In *McMann*, the court wrote:

> A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged. [Citations omitted.] That admission may not be compelled, and since the plea is also a waiver of trial—*and unless the applicable law otherwise provides*,[11] a waiver of the right to contest the admissibility of any evidence the state might have offered against the defendant—it must

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[1] *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

> be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. at 748. . . .

397 US. at 766, 90 S. Ct. at 1446 (emphasis added).

The accompanying footnote reads:

> 11. New York law now permits a defendant to challenge the admissibility of a confession in a pretrial hearing and to appeal from an adverse ruling on the admissibility of the confession even if the conviction is based on a plea of guilty. N.Y. Code Crim. Proc. § 813-g (Supp. 1969) (effective July 16, 1965). A *similar provision permits a defendant to appeal an adverse ruling on a Fourth Amendment claim after a plea of guilty.* N.Y. Code Crim. Proc. § 813-c (Supp. 1969) (effective April 29, 1962).

Id. n.11 (emphasis added).

The *McMann* court also wrote that

> 13. We do not here consider whether a conviction, based on a plea of guilty entered in a State permitting the defendant pleading guilty to challenge on appeal the admissibility of his confession (as in New York after July 16, 1965, see n.11, *supra*), would be open to attack in federal habeas corpus proceedings on the grounds that the confession was coerced. Cf. United States ex rel. Rogers v. Warden of Attica State Prison, 381 F.2d 209 (C.A. 2d Cir. 1967).

Id. at 770, 90 S. Ct. at 1448, n. 13.

In *United States ex rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209 (2d Cir. 1967), the Second

Circuit held that under the criminal statutory scheme of New York, following an unsuccessful motion to suppress evidence, a defendant, by pleading guilty, does not thereby forfeit his right to apply for federal habeas corpus relief should his state appeal prove unsuccessful.[2]

Since the California Penal Code § 1538.5(m) (West Supp. 1973)[3] provides a similar statutory scheme, I would hold as had the Second Circuit that petitioner should not be deprived of federal habeas corpus relief.[4]

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[2]The rationale of the Second Circuit was as follows:

> New York has thus provided a specific statutory exception to the general rule that a plea of guilty bars a defendant from raising on appeal alleged nonjurisdictional defects. And, we are quite easily able to discern legitimate and powerfully compelling reasons for establishing such an exception. In the greater number of cases, the present one being illustrative, a defendant in a criminal case recognizes that unless he succeeds in suppressing the evidence seized, the state will have little difficulty in proving the charges filed against him. A defendant may well have no desire to go to trial once his pretrial suppression motion has been denied, and thereafter may lose heart for any defense to the charges. If, however, the defendant is confronted with state law which decrees that a plea of guilty bars him from appealing the denial of his motion, then he will be presented with a fait accompli and be forced to proceed to trial just so that he can preserve his right to appeal. Section 813-c is an enlightened statute and was designed to alleviate this undesirable and archaic end which can only result in cluttering trial calendars. The guilty plea in such circumstances is merely a procedural step which permits review of the defendant's constitutional claims without the necessity of a trial that would be a waste of time, money and manpower.

381 F.2d at 214.

[3]Cal. Pen. Code § 1538.5(m) provides in part: "A defendant may seek further review of the validity of a search or seziure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

[4]I also concur with the language of the Second Circuit in reaffirming the principle enunciated in *United States ex rel. Rogers v. Warden of Attica State Prison:*

(This footnote is continued on next page)

The California procedure encourages competent counsel to resolve all else but the legal issues specifically reserved for precisely the reasons advanced in *United States ex rel. Rogers v. Warden of Attica State Prison.* Its purpose is to negate the very relinquishment of which *Tollett* speaks. This statutory scheme does not waive the petitioner's rights, as the majority suggests *Tollett* mandates, but was specially enacted to preserve those rights—and preserved they were by the petitioner's adherence to the procedures outlined in § 1538.5-(m). Hence, based on the *Brady* trilogy itself, *Tollett* cannot be considered persuasive authority as to the petitioner's claim. The competence of counsel discussed in *Tollett* is clearly not applicable here; any competent California attorney would assure his client that he had

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> There is some initial appeal in the State's argument that habeas corpus tests the legality of custody, that the State's custody of Molloy is pursuant to his conviction on his plea of guilty, and that there is no claim that the plea was improperly induced, and that New York's decision to allow a criminal defendant to appeal from a judgment of conviction on the ground of error in a suppression ruling notwithstanding a guilty plea goes beyond the requirements of the Consitution and should not enlarge a prisoner's right to federal habeas corpus. [Foonote omitted.] But acceptance of the State's contention would make the final paragraph of § 813-c a trap rather than the beneficient and "enlightened statute," 381 F.2d at 214, it was meant to be. While in strict letter New York has said only that a plea of guilty will not foreclose *appeal* from the denial of a motion to suppress, defendants and their counsel would scarcely read the statute so narrowly; the natural interpretation would be rather that they might plead guilty and still preserve all remedies with respect to the alleged unlawful search that would otherwise have been available—including ultimate resort to a federal court. What the result should be if New York were to say in so many words that the sole remedy with respect to an illegal search preserved on a plea of guilty was by an appeal or other remedies in the state system, we are not now required to decide.
>
> *United States ex rel. Molloy v. Follette,* 391 F.2d 231, 232 (2d Cir. 1968) (emphasis original).

specifically reserved (as here) by his plea that which the majority now holds as a matter of law, he has forever and affirmatively waived by that very same plea. The rationale of *Tollett* should not, therefore, be used on a procedural basis as authority for disposing of the substantive claim herein involved.

On the merits of the petition I would reverse the judgment of the district court and would concur in the dissenting opinion filed by Justice Peters in *Mann v. Superior Court*, 3 C.3d 1, 472 P.2d 468, 88 Cal. Rptr. 380 (1970). Police, while engaged in the investigation of a private party in the home of a school teacher, first, came upon the petitioner's property and surveyed the interior while standing between bushes and a window,[5] and thereafter, entered the petitioner's premises following closely behind invited guests. (Unknown voices answered "come in," in response to a knock.) Serious issues as to probable cause and the validity of consent were raised by the petitioner. A small quantity of marijuana was found inside the residence and all persons present were arrested. Admittedly and concededly, the officers were without lawful probable cause at the time they approached the front door, and by the only prosecution testimony offered, specifically eliminated the odor of marijuana (which was detected when they entered the residence), as any factor in the probable cause for the subsequent arrests.[6] The con-

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[5]*Compare Lorenzana v. Superior Court of Los Angeles County*, ... Cal. 3d ....., ... P.2d ...., ... Cal. Rptr. .... (L.A. 29989, filed June 20, 1973).

[6]"Q. [by defense counsel] as you were knocking on the door, at that time you intended to arrest all the occupants of that house except the three which you followed in, is that correct? A. [by Lieutenant Olmos] Correct. Q. And you had reached that conclusion after seeing what you saw in

ent issue was crucial to the resolution of the violations alleged.

Certainly the facts of this case are subject to the interpretation that the only tenable opportunity remaining open to the officers in retrieving a tainted situation was to finesse a constitutional violation and construe a simple knock with the expected "come in," voiced by persons who could only reasonably anticipate other guests, and certainly not governmental agencies, into a consent which would permit the blanket arrests and a comprehensive search of the premises.[7] To torture such wording into a knowing and intelligent waiver of such a fundamental constitutional right by the householder does a disservice to elemental justice, given the totality of circumstances.[8] It would seem that there should have been some attempt on the part of the officers, knowing as they did their own purpose and intent, to announce their identity prior to seeking consent to enter onto the premises as envisioned in the underlying rationale of California Penal Code § 844 (West 1970).[9] The essence of the fourth amendment

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the window? A. That is correct. Q. And, therefore, when you walked into the house and smelled the odor of marijuana, that certainly did not contribute to your conclusion in that regard, is that correct? A. Just confirmed my suspicions. Q. But it was an element, as far as you are concerned, of reaching that particular conclusion? A. No sir. Q. I beg your pardon? A. No, sir."

Mann v. Superior Court, 3 Cal. 3d at 13, 472 P.2d at ...., 88 Cal. Rptr. at .... (1970) (Peters, J. dissenting).

[7]The search was prior to the decision in *Chimel v. California*, 395 U.S. 752 (1969).

[8]*Schneckloth v. Bustamonte*, 93 S. Ct. 2041, 2047-48 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[9]Cal. Pen. Code § 844 provides:

To make an arrest, a private person, if the offense be a

(This footnote is continued on next page)

would seem to require no less. These were officers about to execute a mass arrest without any attempt to seek or comply with any legal process, and indeed their initial activity flew in the face of the constitutional mandate. I would, therefore, hold that the constitutional rights assured to the petitioner by the fourth and fourteenth amendments were violated. I would remand the matter to the district court with instructions to grant the petition.

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felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

Order Denying Application for Writ of Habeas Corpus, and Dismissing Petition.

In the United States District Court, for the Central District of California.

In re the Application of Thomas Richard Mann for a Writ of Habeas Corpus, Petitioner, vs. Steward C. Smith, Chief Probation Officer, San Bernardino County, et al., Respondents.

Evelle J. Younger, Attorney General of California, Real Party in Interest. Civil No. 71-645-RJK.

Filed: March 26, 1971.

This proceeding was commenced by the filing of an application for a writ of habeas corpus on March 18, 1971, seeking the release of petitioner from custody of respondent, the Chief Probation Officer of San Bernardino County. Petitioner's application invokes jurisdiction under 28 U.S.C. § 2241; the court, having considered the application and Points and Authorities submitted in support thereof, declined to order a return to the petition by the real party in interest, the Attorney General of California, and for reasons hereinafter stated the petition is hereby denied.

Respondent's custody of petitioner resulted from his arrest on January 31, 1969, and subsequent conviction for violation of California Health and Safety Code section 11530.[1] Prior to trial, petitioner moved, pursuant to California Penal Code section 1538.5, to sup-

[1]Cal. Health and Safety Code § 11530. Possession of Marijuana; . . . .

"Every person who possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not less than one year or more than 10 years."

press evidence seized at the scene of the alleged crime; specifically, petitioner asserted that marijuana sought to be introduced against him had been unlawful seized. On November 13, 1970, petitioner's motion to suppress was denied by the Superior Court of San Bernardino County; thereafter, the Court of Appeal of the State of California, Fourth Appellate District, denied petitioner's application for a writ of mandate; on August 10, 1970, the Supreme Court of California did likewise, 3 Cal. 3d 1, 88 Cal. Rptr. 380, 472 P.2d 468 [Mr. Justice Peters dissenting]; on November 9, 1970, Mr. Justice Douglas of the United States Supreme Court denied petitioner's application for a stay for lack of a "final" judgment; and on January 25, 1971, the Supreme Court of the United States denied certiorari. Stating that the only issues in his case had already been decided by the California Supreme Court, petitioner pleaded guilty to unlawful possession of marijuana and was sentenced to two years probation. Claiming the above proceedings exhausted his state remedies, petitioner now seeks release from custody by this court, asserting constitutional grounds.

The facts before the trial court which denied petitioner's Penal Code section 1538.5 motion were as follows:

On the afternoon of petitioner's arrest, the Chief of the Redlands Police Department received a telephone call from a school official in nearby Rialto stating that he had reason to believe there had been marijuana parties at a certain address in Redlands, and further stating that there might be such a party that night. Early that evening, a police officer went to the address in question; he entered an alley behind the house where he observed a party taking place. Other officers were called,

and, upon their arrival, one of the officers entered upon the property, went around to the side of the house and looked in through a window, observing what appeared to be a marijuana party going on inside. The officer thereafter went around to the front of the house and continued his observations for about fifteen minutes. The officer saw several people enter and leave the house, some of whom appeared to be under the influence of intoxicating drugs. Shortly after three persons entered the house the officer went to the front door and knocked three or four times. The officer heard a voice say, "come in." The officer entered, smelled marijuana smoke and odor, seized several packets of marijuana and made arrests, including petitioner's. Petitioner and others at the scene denied that there was any marijuana smoking at the party and denied that they had heard the arresting officer knock before entering the house. Petitioner further denies in his application that anyone told the officer to "come in." The trial court, however, believed the officer's testimony.

Petitioner asserts in his memorandum in support of the application that (1) the officer's conduct in looking through the window at the side of the house was an unreasonable search within the meaning of the Fourth and Fourteenth Amendments, and (2) any consent to enter the house arising from the officer's hearing someone in the house say "come in" did not dissipate the asserted taint of prior illegal police conduct in trespassing upon the property.

The court is neither bound nor compelled by prior state determinations in this matter. 28 U.S.C. § 2244 (c); § 2254(d); *Brown v. Allen*, 344 U.S. 443, 456

(1953). Nonetheless, upon a full examination and review of the petition and memorandum in support thereof, as well as the trial court's memorandum denying petitioner's motion to suppress and the Opinion of the Supreme Court of California, this court does not find that petitioner's conviction raises any issue in constitutional dimension.

The fact that the arresting officer might not have sought entry to the house absent observations through the windows at the side of the house does not itself taint the entry and subsequent arrest. *Wong Sun v. United States,* 371 U.S. 471, 488 (1963). In order to violate the principles of the Fourth and Fourteenth Amendments, the arrest and seizure must flow directly from unlawful police conduct without any supervening event or conduct. *McLindon v. United States,* 329 F. 2d 238, 240 (D.C. Cir. 1964). The arrest and seizure followed from the permission to enter the house given by one or more of the participants at the party. Accordingly, even if the observations through the windows constituted unlawful police conduct, it cannot be said that entry and the subsequent arrest and seizure were the direct results of the alleged unlawful search. The trial court found that the consent for entry by the officer was given without any coercive or intimidating activity on the part of the officer; the mere fact that the participants might not have given consent had they known a police officer was at the door does not warrant this court in concluding that the consent was not freely given. The participants may have expected more guests and not the police, but the act of freely admitting persons to the house without inquiry as to their identity negates petitioner's contention that police entry violated a legitimate expectation of privacy on the

part of the participants at the party. For that reason, the court is unimpressed with the contention that the person or persons who told the officer to "come in" may not have been specifically authorized to exercise control over the premises.

Once inside, the odor of marijuana smoke was sufficient to constitute probable cause for the police to make the arrests and search of the house.

For the foregoing reasons, this court does not believe that the application herein raises constitutional issues requiring either a hearing or the granting of the relief requested.

This opinion will be deemed to constitute Findings of Fact and Conclusions of Law.

It appearing to the court that petitioner has failed to show that he is entitled to the relief requested,

IT IS HEREBY ORDERED that the application be and hereby is denied and the petition dismissed.

IT IS FURTHER ORDERED that the Clerk of the Court send, by United States mail, copies of this order to Messrs. Gilbert, Mann & Sarno, counsel for petitioner, and to the Attorney General of California, the real party in interest.

DATED: March 26, 1971.

/s/ Robert J. Kelleher
Robert J. Kelleher
United States District Judge